

CASE CLIPS

Selected decisions of the Indiana appellate courts abstracted for judges by the Indiana Judicial Center.

VOL. XXVIII, NO. 23

July 13, 2001

CRIMINAL LAW ISSUES

HOLSINGER v. STATE, No. 49S00-9812-CR-750, ___ N.E.2d ___ (Ind. June 29, 2001).
SULLIVAN, J.

During Lopez's cross-examination, Defendant attempted to impeach Lopez's testimony by implying that she was lying. Defendant referred to Lopez's plea agreement, suggesting that Lopez was lying to get favorable treatment by the prosecutor. Defendant also referred to the two different statements that Lopez gave to the police, emphasizing that they were not consistent:

[Defense Counsel]: ...After all this time, you haven't been sentenced?

[Lopez]: Correct.

[Defense Counsel]: Because if you don't follow the terms of the plea agreement then it will be withdrawn...?

[Lopez]: Correct.

[Defense Counsel]: Who determines, Ms. Lopez—anybody in this room—who determines whether or not you're telling the truth today to qualify and satisfy the requirement of this plea agreement.

[Citation to Record omitted.]

On redirect examination, to repair her credibility, the State asked Lopez to read portions of the second statement that she had given to the police. This statement regarding the gloves, the knife, and Defendant's confession were all consistent with her trial court testimony. Defendant objected that her out-of-court statement to police was hearsay and therefore inadmissible.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. See Ind. Evidence Rule 801(c). Generally, hearsay is inadmissible. See Ind. Evidence Rule 802. Under Indiana Evidence Rule 801(d)(1)(B), a statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the

statement, and the statement is (a) consistent with the declarant's testimony, (b) offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, and (c) made before the motive to fabricate arose.

Here, Lopez's trial testimony was consistent with her second statement to the police. It was also offered to rebut an implied charge of fabrication; Defendant's cross-examination implied that Lopez lied during her testimony. Therefore, the statement was properly admissible if it was made before a motive to fabricate arose.

While Lopez might have had a motive to lie in her statement of January 24th, she did not have a motive to implicate Defendant in the murder. There was no evidence suggesting—and Defendant does not contend—that Lopez herself killed the victims. The statement she read at trial contradicted her statement from the day before, shifting blame from Dennis to Defendant. To the extent she was guilty of robbery and felony murder, her culpability would have been the same whether either Defendant or Dennis had killed Sloan. We find no motive on Lopez's part to fabricate Defendant's role in Sloan's murder. There is no contention that she tried to minimize her own; indeed, she implicated herself in the robbery and, as a consequence, felony murder. [Footnote omitted.] Moreover, in regards to the crime in which she did have a motive to fabricate—the robbery—she implicated herself.

SHEPARD, C. J., and RUCKER, J., concurred.

BOEHM, J., filed a separate written opinion in which he concurred and in which he concurred in the result, in part, as follows:

With respect to Part II, I agree with the concurring in result opinion of Justice Boehm that the admission of Lopez's prior consistent statement was harmless error.

DICKSON, J., filed a separate written opinion in which he concurred, concurred in the result, and dissented, in part, as follows:

Because I believe that Lopez's statement to police was made after her motive to fabricate arose, I would conclude that it was error for the trial court to admit that statement.

The majority stresses the facts that: (1) no evidence was presented that suggested that Lopez herself committed the murders; and (2) Lopez admitted her role in the robbery, and therefore opened herself up to charges of robbery and felony murder. However, it is undisputed that Lopez accompanied Holsinger to the crime scene, stood by while two victims were murdered, participated in the robbery of the victims, and fled with Holsinger to another state. Only after learning that police were searching for both Lopez and Holsinger did Lopez voluntarily go to the police to give a statement. In her first statement, she attempted to minimize the roles that both she and Holsinger played in the crimes. In her second statement, given the next day, she admitted her role in the robbery and implicated Holsinger in the murder and robbery. Lopez's voluntary statements to police included an admission of her culpability in the crimes, but they also minimized her role vis-à-vis the other participants and set the stage for her eventual plea agreement. Before she voluntarily spoke to police, Lopez knew that she was wanted for questioning in connection with these crimes. It seems reasonable to conclude that she decided that a proactive approach was her best bet to secure a reduced sentence.

This Court recently considered a different fact pattern in Stephenson v. State, 742 N.E.2d 463 (Ind. 2001)]. In that case, the accomplice/witness, Dale Funk, had a level of involvement in a triple murder comparable to Lopez's here. Stephenson, 742 N.E.2d at 470-72. However, Funk's prior consistent statement was not a voluntary admission to police. Id. at 472-73. Rather, it was a part of a conversation with an uninvolved third party a few days after the crime. Funk received no prosecutorial benefit for his testimony. Id. at 475. Thus, although I agree with the conclusion in Stephenson that Funk had no motive to fabricate when he made his prior consistent statement, I believe that the differences in the fact patterns justify a different result in this case.


The facts of Thompson v. State, 690 N.E.2d 224 (Ind. 1997), are analogous to this case. The accomplice/witness, Douglas Percy, voluntarily went to police and made a statement implicating Jerry Thompson in a double murder and robbery. Id. at 228. Percy admitted participating in the robbery after Thompson unexpectedly shot the victims. Id. Pending charges against Percy for another felony were dismissed in exchange for his testimony against Thompson. Id. Given these facts, we noted that admission of Percy's statement to police consistent with his testimony was arguably improper because "Percy had every reason to shift culpability to Thompson while minimizing his own involvement." Id. at 232 n.8; accord Bouye v. State, 699 N.E.2d 620, 625-26 (Ind. 1999) (accomplice's motive to fabricate arose at the time of the crime).

I would find that Lopez had a motive to fabricate before she made her voluntary statement to police. I would therefore hold that admission of her prior consistent statement was error. However, given the other evidence against Holsinger, I would find the error harmless.

WRINKLES v. STATE, NO. 82S00-9803-PD-170, ___ N.E.2d ___ (Ind. June 29, 2001).
RUCKER, J.

Typical methods of restraint include handcuffs, shackles, security chairs, and gagging a defendant. [Citations omitted.] . . .

The stun belt, also known as the REACT (Remote Electronic Activated Control Technology) security belt, is an electronic shocking device that is secured around the wearer's waist. [Citation omitted.] . . .

Two nine-volt batteries connected to prongs that are attached to the wearer over the left  they region power the belt. [Citations omitted.] The belt may be activated from as far away as 300 feet, and once activated it delivers an eight-second, 50,000-volt shock that cannot be stopped. [Citations omitted.] This high-pulsed electrical current travels through the body along blood channels and nerve pathways. [Citation omitted.] The belt's electrical emission knocks down most of its victims, causing them to shake uncontrollably and remain incapacitated for up to forty-five minutes. [Citations omitted.] Activation may also cause immediate and uncontrolled defecation and urination, and the belt's metal prongs may leave welts on the wearer's skin requiring as long as six months to heal. [Citation omitted.] Activation may cause some wearers to suffer heartbeat irregularities or seizures. [Citation omitted.] Manufacturers of the stun belt emphasize that the belt relies on the continuous fear of what might happen if the belt is activated for its effectiveness. [Citation omitted.]

In Hawkins v. Comparet-Cassani, 33 F. Supp 2d 1244 (C.D. Cal. 1999), a defendant who had a stun belt placed on him prior to a sentencing hearing and later activated at the judge's order filed a civil rights action against the county, judge, sheriff, and others. . . . [T]he trial judge in the United States District Court for the Central District of California observed:

The stun belt, even if not activated, has the potential of compromising the defense. It has a chilling effect. It is inherently difficult to define in a particular

judicial proceeding the boundary between permissible and impermissible conduct—the boundary between aggressive advocacy and a breach of order. An individual wearing a stun belt may not engage in permissible conduct because of the fear of being subjected to the pain of a 50,000 volt jolt of electricity. For example, a defendant may be reluctant to object or question the logic of a ruling—matters that a defendant has every right to do. A defendant's ability to participate in his own defense is one of the cornerstones of our judicial system. A pain infliction device that has the potential to compromise an individual's ability to participate in his or her own defense does not belong in a court of law.

Further, if the defendant is shocked by the stun belt, the defense is likely to be even more compromised. First, it is unreasonable to expect a defendant to meaningfully participate in the proceeding following a shock. Second, having been shocked for a particular conduct the defendant may presume that other conduct, even if appropriate, may result in other shocks.

[Citation to Record omitted.] . . .

Although not all courts have taken this stance, [footnote omitted] we agree with the observations of the federal court judge and thus hold that henceforth stun belts may not be used on defendants in the courtrooms of this State. This is so because we believe that the other forms of restraint listed above can do the job without inflicting the mental anguish that results from simply wearing the stun belt and the physical pain that results if the belt is activated. . . .

. . . .

[I]t is error for a trial court to require a defendant appearing before the court to wear restraints as a matter of course. Rather, the restraints must be necessary, and the reasons supporting the trial court's determination must be placed on the record. [Citation omitted.] Nonetheless, the record reflects that the trial court apparently has a policy of requiring defendants to wear restraints regardless of whether they have previously exhibited any conduct justifying restraints. [Citation to Record omitted.] . . . Thus, even though the trial court's policy would not likely withstand appellate scrutiny if the issue were presented, it is apparent that at least at the time of Wrinkles' trial, an objection to wearing restraints would not have been sustained by the trial judge even if made. [W]rinkles has not sustained his burden of demonstrating that counsels' performance on this issue fell below an objective standard of reasonableness.

. . . .

BOEHM. J., filed a separate written opinion in which he concurred and in which he concurred in the result, in part, as follows:

I concur in all parts of the majority opinion except Part I.C.1, in which the majority categorically prohibits use of the "stun belt" in Indiana courtrooms. . . . [T]rial courts are often faced with hard choices. It is not at all clear to me that the belt is a less desirable alternative to restraints that are plainly visible and convey to the jury the message that the defendant cannot be trusted to comport himself in a manner consistent with courtroom decorum. . . . [W]here some form of restraint is to be used, I would not categorically prohibit the belt in favor of others that may be even more hostile to a fair trial.

. . . .

MOLDEN v. STATE, No. 49A04-0010-CR-448, ___ N.E.2d ___ (Ind. Ct. App. June 28, 2001).
NAJAM, J.

There is no statute that addresses credit for time served while on pretrial home detention. We therefore conclude that time spent in pretrial home detention is not equivalent to pretrial time served in a prison or jail and that pretrial home detainees are not entitled as a matter of law to receive credit for time served on home detention toward any eventual sentence. Thus, the trial court here did not abuse its discretion when it denied

Molden credit for time spent in pretrial home detention, and we affirm the trial court's sentence.

....
BARNES and DARDEN, JJ., concurred.

CIVIL LAW ISSUES

ESTATE OF SKALKA v. SKALKA, No. 46A03-0009-CV-327, ___ N.E.2d ___ (Ind. Ct. App. July 10, 2001).

MATTINGLY-MAY, J.

The record contains sufficient evidence to support the trial court's finding that an agreement was reached at the pretrial conference. We note initially that the lack of a transcript of the settlement conference does not render the agreement unenforceable. Generally, a settlement agreement is not required to be in writing; *see, e.g., Vernon v. Acton*, 732 N.E.2d 805, 809 (Ind. 2000). Here, the trial judge was present during the settlement discussions, and thus he heard the parties agree to the settlement. In addition, we find it particularly compelling that Jay, Joseph, and Laura's own counsel drafted a written version of the agreement that very afternoon after the conference and provided it to all parties and to the trial court. Thus, we are not persuaded by Jay, Joseph, and Laura's argument that the trial court's inaccurate memory is the only evidence in support of the agreement. [Footnote 1 omitted.]

Jay, Joseph, and Laura next argue that the judge improperly acted as a mediator during the pretrial conference on November 16, 1999. They note that the ADR rules prevent a judge from acting as a mediator. They also argue the pretrial conference agreement was nothing more than a failed attempt at mediation and thus should be considered under the Alternative Dispute Resolution rules. They point to the following statement by the judge in support of their argument:

You know, we sat in my chambers, people, and you walked out of my office in agreement. Alright. I did as much as I could possibly do to resolve the conflict. But if you people want to continue fighting, I'm no longer going to be the *mediator* here, I'm going to be a judge. You are going to go through the cost of this thing. It's going to be financially draining and I can tell you you're going to wind up losing the property.

[Citation to Record omitted.]

However, we find that this statement merely indicates the trial judge was attempting, in his role as judge, to assist the parties in reaching a settlement of their disputes, not that he was seeking to act as a mediator in a mediation governed by the Alternative Dispute Resolution (ADR) rules. Mark's brief contains an especially apt description of the trial court's actions: the trial judge was simply "entertaining settlement discussion at a pretrial conference." [Citation to Brief omitted.] Generally, the purpose of a pretrial conference is to narrow the issues for trial; in this case, all the issues were resolved at the pretrial conference. As this was a pretrial conference and not a mediation, the judge did not act improperly.²

Next, Jay, Joseph, and Laura note that the trial judge met with the parties in chambers for a period of time without their attorneys present; after a settlement was reached, the judge called the attorneys into his chambers to review the agreement along with their clients. They suggest they were subjected to undue pressure from the trial judge to settle during this meeting. While this method of attempting to resolve a dispute is perhaps somewhat unorthodox, we find no impropriety [footnote omitted] in this action by the court. Indeed, Jay,

² The case before us brings into relief the potential for conflict between a judge's traditional role as decisionmaker and a court's well-intentioned attempts to encourage and facilitate less-formal resolution of disputes by the parties themselves. A court's readiness to take advantage of the various options offered by the Indiana Alternative Dispute Resolution rules might help to avoid situations like this one where, as a result of a judge's diligent efforts to bring about settlement among the parties, "no good deed goes unpunished." *Eaton v. Onan Corp.*, 117 F. Supp.2d 812, 835 (S.D. Ind. 2000).

Joseph, and Laura's attorney drew up settlement documents immediately following the conference, an action we imagine he would not have taken had he suspected any undue influence had been exerted on his clients.

....
BAILEY and FRIEDLANDER, JJ., concurred.

CRAFTON v. GIBSON, No. 40A04-0011-CV-490, ___ N.E.2d ___ (Ind. Ct. App. July 11, 2001).

RILEY, J.

Appellant-Respondent, Nancy Crafton (Crafton), appeals the trial court's Order denying her Motion for Relief from Judgment filed pursuant to Ind.Trial Rule 60(B)(7) which requested relief from the trial court's judgment granting grandparent visitation to Appellee-Petitioner, Ada E. Gibson (Gibson).

We reverse and remand with instructions.

....
Crafton raises several issues on appeal, which we consolidate and restate as one issue: whether, under the United States Supreme Court's decision in *Troxel v. Granville*, 530 U.S. 57 (2000), the trial court erred in not granting Crafton's T.R. 60(B)(7) Motion for Relief from Judgment.

....
On June 5, 2000, the United States Supreme Court issued its decision in *Troxel*, 530 U.S. 57. In a plurality decision, the Supreme Court concluded that the Washington State statute, Wash. Rev. Code § 26.10.160(3), [footnote omitted] under which the Troxels were granted visitation with their paternal grandchildren, was unconstitutional as applied because it violated the children's mother's (Granville) due process right to make decisions regarding the care, custody and control of her children. [Citation omitted.] . . .

....
Our court has noted that:

[T]he Act does not presume that grandparent visitation is necessarily in the children's best interest. Instead, the burden is on the grandparent, as the petitioning party, to demonstrate by a preponderance of the evidence that court-ordered visitation is in the children's best interest. See I.C. § 31-1-11.7-3. If such a showing is made, it falls to the court to evaluate the evidence, assess the circumstances, and carefully devise a visitation schedule that is in the children's best interest.

Sightes [v. Barker], 684 N.E.2d [224 (Ind. Ct. App. 1997), *trans. denied*] at 230. However, the *Troxel* decision requires us to take this process one step further and presume that a fit parent's decision is in the best interest of the child. [Citation omitted.] Thus, the best interests determination cannot be left solely to the trial court's discretion without considering and giving deference to a fit parent's decision. [Citations omitted.]

In the case before us, there is no allegation that Crafton is not a fit parent. As such, the trial court was required under *Troxel* to give special weight to her decision not to allow Gibson visitation with her minor children. That said, it is important to note that this presumption is rebuttable. [Citation omitted.] Thus, a grandparent seeking visitation has the burden of rebutting the presumption that a decision made by a fit parent to deny or limit

visitation was made in the child's best interest. Here, Gibson had the burden of rebutting the presumption that Crafton's decision not to allow visitation was in her children's best interest.

....

Although the trial court indicated that it applied a *Troxel* analysis to this case, it appears from the Record and the trial court's reasoning here that no special weight was given to Crafton's decision concerning grandparent visitation. Furthermore, the Record is undeveloped with regard to whether the trial court concluded that Crafton had denied Gibson all access to the children or had offered some visitation. Without this determination, we cannot discern whether any weight was given to Crafton's offer of visitation. Thus, with the Record that was before the trial court, we do not believe that the trial court could have properly undertaken an accurate *Troxel* analysis of this case.

Consequently, although we agree with the *Sightes* decision that I.C. § 31-17-5-2 is constitutional on its face, we conclude that the trial court failed to apply the presumption as now required by *Troxel* that a fit parent's decision with regard to grandparent visitation is made in the children's best interest. The trial court also failed to address whether Crafton was entitled to have any weight given to her alleged offers of visitation. It is clear from the trial court's analysis that the court took a neutral stance, which was proper under *Sightes*, in determining the best interests of the children. Now however, in light of the *Troxel* decision, if a parent is fit, a trial court is required to give special weight to the parent's decision regarding grandparent visitation. Again, we note that this presumption is rebuttable and the petitioning grandparent has the burden of rebutting this presumption.

Accordingly, we remand this matter to the trial court for a new hearing in light of our decision herein. . . .

....

FRIEDLANDER and SULLIVAN, JJ. concurred.

JUVENILE LAW ISSUE

D. D. K. v. State, No. 20A03-0101-JV-18, ___ N.E.2d ___ (Ind. Ct. App. July 6, 2001).

KIRSCH, J.

D.D.K. appeals an adjudication finding him to be a delinquent child for committing battery, [footnote omitted] an act which would be a Class A misdemeanor if committed by an adult. . . .

....

When defense counsel called D.D.K.'s aunt to testify at the hearing, the State objected on the basis that the defense had not disclosed her as a witness ten days prior to trial as required by local rule. The trial court agreed and excluded the testimony of both D.D.K.'s aunt and mother for failure to timely disclose them as witnesses. During the exchange between counsel and the court, the State noted that it further objected to the testimony of both the aunt and mother, whose testimony was intended to show that D.D.K. was not present at the brawl, because D.D.K. did not file a notice of alibi defense as required by statute.

....

The trial court should have allowed the two witnesses to testify after giving the State a recess, or if necessary a continuance, to obtain records on the witnesses and speak with them. [Citation omitted.] Under the present circumstances, the "most extreme sanction" of witness exclusion could have been avoided.

Nevertheless, we find that trial court error, if any, was harmless. Here, D.D.K. never filed a motion to present an alibi defense pursuant to IC 35-36-4-1(2), which requires a

defendant to inform the trial court in writing of defendant's intention to offer an alibi defense to a misdemeanor charge. When a defendant fails to file a notice of alibi in accordance with IC 35-36-4-1, the trial court *shall exclude* any alibi evidence offered by the defendant. *Adkins v. State*, 532 N.E.2d 6, 8 (Ind. 1989) (emphasis added). See also IC 35-36-4-3(b) (if defendant failed to file a statement of alibi, and does not show good cause, court shall exclude evidence offered to establish alibi). In this case, because no notice of alibi was ever filed, nor good cause shown for such failure, D.D.K.'s counsel would have been prohibited from presenting any alibi testimony, other than defendant's own testimony, which was not presented in this case. [Citation omitted.] Thus, even if D.D.K.'s counsel had timely disclosed the mother and aunt as witnesses, the trial court would have been justified in excluding their testimonies. . . .

SHARPNACK, C. J., and MATTINGLY-MAY, JJ., concurred.

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Indiana Judicial Center
National City Center - South Tower, 115 West Washington Street, Suite 1075
Indianapolis, Indiana 46204-3417
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